ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

COMMENTS OF BROAD STREET TELEVISION, L.P.

Broad Street Television, L.P., licensee of Television Station KWQC-TV, Davenport, Iowa, by its attorneys, submits its joint comments in response to the Commission's Further Notice of Proposed Rulemaking[1/] in the above-captioned proceeding.

I. INTRODUCTION

The Further Notice proposes a modest first step to ease television broadcasters' regulatory burden and to enhance their ability to compete in the ever growing and technologically changing video marketplace. Among its proposals is modification of the television duopoly rule to change the prohibited contour overlap from Grade B to Grade A.

The duopoly rule was initially promulgated to "promote maximum diversification of program and service viewpoints."[2/] However, the ballooning influx of competitors in the video marketplace has rendered this rationale obsolete. The vast increase in the number of both radio and television broadcast stations, not to mention the introduction of LPTV service, the almost universal penetration of cable and the development of MMDS, SMATV, DBS and video

---

1/ Further Notice of Proposed Rulemaking, MM Dockets Nos. 91-221, 87-8, FCC 94-322 (Jan. 17, 1995) ("Further Notice").

2/ Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 2 R.R.2d 1588 (1964) ("Report and Order"), recon. denied 3 R.R.2d 1554 (1964).

dialtone, have guaranteed increasing diversity in the types and numbers of media voices for the foreseeable future. The Commission should acknowledge that its current rigid duopoly restriction is unnecessary, and, indeed, counterproductive in today's environment by relaxing prohibited television overlap from the Grade B to the Grade A contour.

II. BACKGROUND

The television duopoly rule was first adopted in 1964. In its Report and Order, the Commission concluded that no single entity should be permitted to have a cognizable interest in two television stations whose Grade B service contours overlap. The Commission explained that the duopoly rule was needed to prevent one person or group from having "an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[3/] Requiring separate ownership of television stations in Grade B service areas, the Commission reasoned, would ensure competition, and therefore, programming and viewpoint diversity. In defending its choice of the Grade B contour to measure prohibited overlap, the Commission reasoned that, compared to radio, television has few available channels, creating a greater possibility for one person or group to dominate the television airwaves. The Commission also noted that "[i]n many areas of the country today, Grade B television signals provide the only available service . . . ."[4/] Although the Commission's reasons for prohibiting Grade B contour overlap plainly no longer exist, the television duopoly rule has remained virtually unchanged since 1964.

Several years ago, however, recognition of the evolving options in the video marketplace caused the Commission to consider modifying the restrictive television duopoly and other cross-ownership rules. Focusing on the video programming market from 1975 to 1990, the FCC's Office of Plans and Policy in 1991 issued a report describing in substantial detail the

---

3/ Report and Order, 2 R.R.2d at 1592.

4/ Id. at 1599.

increased competition in broadcast services during those fifteen years.[5] The OPP Report noted that, "[t]he advent of alternative video media has radically altered the market in which television stations and networks operate."[6] As evidence of the increased diversity of services, the OPP Report stated that as of 1990, more than 90% of television households had access to cable television, and 20% of homes not passed by cable had home satellite dish systems.[7] The OPP Report explained that the advances in alternative sources of programming had caused and would continue to cause broadcast television stations to experience declining revenues, declining audience shares, and increased programming costs.[8] Consequently, the OPP Report concluded that the current television ownership rules should be substantially modified: "Relaxing or eliminating such rules would allow broadcasters to compete more effectively, and would facilitate the continued provision of valued over-the-air services."[9]

Based on this report, the Commission issued a Notice of Inquiry[10] seeking comment on possible relaxation of existing television ownership rules in order to allow television licensees to more effectively respond to this emerging competition. After reviewing the comments in response to the Notice of Inquiry, the Commission in 1992 issued a Notice of Proposed Rulemaking[11] to formally consider regulatory modifications. One proposed modification was to change the television duopoly rule to prohibit common ownership only in

---

5/ F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996 (1991) ("OPP Report").

6/ Id. at 4011.

7/ Id. at 4000.

8/ Id. at 4097.

9/ Id. at 4002.

10/ Notice of Inquiry in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991).

11/ Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking, 7 FCC Rcd 4111 (1992) ("Notice of Proposed Rulemaking").

cases of Grade A signal contour overlap, which would allow common ownership of television stations that are geographically closer, though still not in the same market. Although a substantial majority of commenters favored this change, the Commission failed to act.

The Further Notice again proposes to relax the television duopoly rule and only prohibit common ownership when stations' Grade A signal contours overlap. Such action is long overdue. The Commission and its staff have studied its three-decade-old rule for five years. In that time, the competition faced by free over-the-air television has increased dramatically, but the industry's ability to compete effectively and efficiently has not. This small first step is a minimal regulatory relaxation which is demanded by the public interest in effective competition.

III. Recent Changes to the Video Marketplace Render Obsolete the Policy Upon Which the Duopoly Rule Was Based.

As noted above, the vast majority of commenters responding to the 1992 Notice of Proposed Rulemaking favored relaxing the television duopoly rule. Now, three years later, the arguments supporting the rule's relaxation are even more compelling. The changes in the video marketplace have continued to accelerate dramatically, rendering the current duopoly restriction even more outdated.

For example, though the television industry has long been fully mature, the number of television stations continues to grow. As of March 31, 1995, there are 32 more stations than when the Notice of Proposed Rulemaking was adopted in 1992.[12/] The growth in low power television stations, a newer video delivery vehicle, has also been dramatic: Since 1992 the number of low power stations has increased by almost 400.[13/] By contrast, when the

---

12/ FCC News Release, "Broadcast Station Totals as of April 30, 1992 (May 7, 1992); FCC New Release, "Broadcast Station Totals as of March 31, 1995 (April 19, 1995).

13/ Id.

Commission adopted its duopoly rule in 1964, there were only 661 television stations and the low power service had not been authorized.[14/]

The growth in the number of stations has been exceeded by the expansion of the number and types of programming services they distribute. When the Notice of Proposed Rulemaking was issued, Fox was merely "emerging as a robust competitor to existing over-the-air networks when not long ago a fourth television broadcast network was unthinkable."[15/] Today, however, Fox is a mainstream network that airs highly rated programs and events such as NFL football games.[16/] Moreover, in January of this year, both Warner Bros., Inc., and United Paramount Network launched two new television networks. Currently, Warner Bros. has 42 affiliated stations covering 72% of homes and United Paramount Network has 96 affiliated stations covering 78% of homes.[17/] These six networks coupled with the numerous cable programming networks provide multiple video programming options to viewers.

Even though it was a mature industry in 1992 (in contrast to 1964),[18/] cable television has also continued to grow in size and diversity. In 1992 there were approximately 11,035 cable systems serving approximately 53 million subscribers.[19/] Three years later, the

---

14/ See Federal Communications Commission, Annual Report for the Fiscal Year 1964 79.

15/ Notice of Proposed Rulemaking at 3.

16/ Steve McClellan, NFL on Fox: Same Game, New Attitude, Broadcasting & Cable, August 15, 1994 at 26.

17/ Steve Coe, Networks Factor in WB and UPN, Broadcasting & Cable, Jan. 2, 1995 at 36-37.

18/ The contrast between cable television today and cable when the duopoly rule was first promulgated in 1964 is remarkable. In 1964, there were only a small fraction of the cable systems existing today—1200 cable systems serving a little over 1 million subscribers. The change has been extraordinary even in the last ten years. In 1985, there were only 6,600 cable systems serving 32 million subscribers.

19/ Television & Cable Factbook, No. 63, (1995) at I-76.

number of cable systems has increased by more than 300 and serve over 56 million subscribers.[20] Cable systems pass nearly 96% of all U.S. households, and 62.5% of U.S. households subscribe.[21]

The growth in cable programming services has also been substantial in the past several years. Cable operators, unlike television broadcasters, have the ability to offer programming from a vast number of sources. Currently, almost 70 percent of cable systems have capacity for at least 30 channels.[22] On most cable systems there are specialized networks for all types of interests. Channels showing only new-release movies, movie classics, comedy, talk shows and sports programming abound. Specialized services continue to be introduced. For instance, in the next year, two new sports networks, Speedvision and Outdoor Life, will begin to offer programming.[23]

Video dialtone is about to become a reality. The Commission has granted twenty applications allowing telephone companies to construct, operate, and maintain facilities to provide video dialtone service. Moreover, several recent court decisions have struck down as unconstitutionally broad the "telco/cable cross-ownership provision,"[24] action which will permit telephone companies, like cable companies, to provide their own video programming directly to subscribers. Several video dialtone trials are already underway.[25]

20/ Id.

21/ Further Notice at 13.

22/ Id. at I-77.

23/ Jim McConville, TM/Cox Unveil New Sports Channel, Broadcasting & Cable, May 1, 1995 at 24.

24/ See 47 U.S.C. § 533; Chesapeake and Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994); U S West, Inc. v. United States, 48 F.3d 1092 (1995).

25/ See, e.g., Mark Berniker, Bell Atlantic Lines Up Product for VOD Trial, Broadcasting & Cable, Mar. 13, 1995 at 14.

Direct broadcast satellite systems (DBS), which can beam 100 or more channels to 18-inch satellite dishes mounted on homes, have also become a force in the video programming market. For example, the four major firms distributing DBS service, Primestar, DirecTV, USSB, and Thompson Consumer Electronics all claim that they exceeded their targets for 1994's national rollouts.[26/]

Wireless cable, broadcast via microwave (MMDS and SMATV) is another addition to the growing list of video program providers. There are now seven major publicly-traded wireless companies with a collective growth rate of about 175,000 customers per year.[27/] Wireless companies are expecting to soon invest in digital equipment that will allow them to expand channel capacity up to 250.[28/]

VCRs constitute another form of competition in the video programming market, allowing the public to view programs at times other than when they are broadcast and to watch pre-recorded tapes for entertainment. Over 80% of the nation's television households own VCRs.[29/]

In other words, the video programming marketplace in 1995 bears no resemblance to the 1964 environment which spawned the current duopoly rule. In 1964, when only four percent of households could receive ten or more over-the-air signals,[30/] and local television stations were the only source of video programming, the current television duopoly rule may have been an appropriate means of fostering diversity and competition. At a time when only a handful

---

26/ Chris McConnell, DBS Business Flying High, Broadcasting & Cable, Jan. 9, 1995 at 54.

27/ Rich Brown, MMDS (wireless cable): A Capital Ideal, Broadcasting & Cable, May 1, 1995 at 16.

28/ Id.

29/ Further Notice at 15.

30/ Notice of Proposed Rulemaking at 10.

of signals were available to viewers, allowing common ownership of any of those stations might have diminished the diversity of viewpoints available to the public. Today, however, with the average cable system carrying more than 30 channels, and the promise of more than 100 channels in the near future from DBS, wireless cable, and video dialtone, such dangers have vanished.

The television duopoly rule should reflect the current environment, not the environment of thirty years ago. The massive influx of competition in the video marketplace has substantially diminished the market share of television broadcasters. The Commission need no longer be concerned that any one over-the-air television voice in a particular market could dominate the ideas and programming broadcast to the public.

IV. The Commission Must Relax the Television Duopoly Rule to Allow Television Broadcast Stations to Compete in the Current Environment

The current antiquated television ownership restrictions unfairly cripple television broadcasters' competitive capabilities. Although the Commission has eased ownership restrictions in other areas, the television ownership rules have remained stagnant. The Commission, for example, permitted expanded common ownership of radio stations.[31/] The Commission has also opened up cable television ownership to the national networks, and has allowed telephone companies to construct and operate video dialtone facilities.[32/]

Relaxing ownership rules has been beneficial both to the affected industries and to the public. Modification of the radio ownership rules, for instance, has been extremely successful. At the time of the FCC's action, the radio industry was declining rapidly. Easing the ownership restrictions prompted a virtual resurrection of the radio industry, allowing it to

---

31/ Revision of Radio Rules and Policies, Report and Order, 7 FCC Rcd 2755 (1992), recon. granted in part, 7 FCC Rcd 6387 (1992), further recon., 9 FCC Rcd 7183.

32/ Amendment of Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, 7 FCC Rcd 6156 (1992).

provide higher quality service to the public. The television broadcast industry is now in a similar situation as was radio several years ago. The restrictive ownership rules have left the television industry unfairly constrained and competitively disadvantaged. The time to ease the restrictions on television broadcasters has long since passed.

Relaxing the television duopoly rule would substantially benefit both the television industry and the public. The currently restrictive television ownership regulations impair over-the-air television broadcasters' ability to provide quality programming, and therefore, to compete effectively against newer forms of video entertainment. Television broadcasters have only one channel for programming and advertising. Its competitors on the other hand, who have fewer ownership restrictions, have multiple channels. A modest relaxation of ownership restrictions could, to a slight degree, ameliorate this competitive handicap.

Joint ownership of stations in two adjacent markets would allow cost sharing of overhead expenses, and program production costs. Broadcasters could consolidate their expenses in providing programming to both stations, thereby increasing the quality of programming. For example, if one entity owned two stations in the same state, it could pool the stations' resources for purposes of news and public affairs programming. Although it may not be cost-efficient for one station to send a reporter to Washington to cover an important national event, having two stations share the expense could make the expenditure worthwhile.

The proposed modification is hardly radical. Even with a relaxed duopoly restriction to the Grade A contour, television broadcasters could not own two stations in the same market. It is inconceivable that such a slight change in the duopoly rule would have a significant adverse impact on the diversity of programming available to even one viewer.

V. CONCLUSION

The remarkable changes in the video programming marketplace since 1964 have completely vitiated the policy foundation for the current television duopoly rule. The Commission should relax the duopoly rule, at a minimum to permit common ownership in the absence of Grade A contour overlap. This modest modification will permit television broadcasters to compete effectively and efficiently, and to begin to achieve cost efficiencies that will allow them to increase the quality of public service programming.

Respectfully submitted,

BROAD STREET TELEVISION, L.P.

By: Suzanne M Perry

Suzanne M. Perry
Pamela S. Arluk

Its Attorneys

DOW, LOHNES & ALBERTSON
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037

(202) 857-2500

May 17, 1995